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SHOOK, HARDY & BACON L.L.P.

KANSAS CITY
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HOUSTON
SAN FRANCISCO
MIAMI

1850 K STREET, N.W., SUITE 900
WASHINGTON, D.C. 20006-2244
TELEPHONE (202) 452-1450 ▪ FACSIMILE (202) 452-1426

LONDON
ZURICH
GENEVA
MELBOURNE
BUENOS AIRES

Rodney L. Joyce
(202) 261-2041
rjoyce@shb.com

November 9, 1997

By Hand

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Dkt. No. 98-147 (Ex Parte Filing)

Dear Ms. Salas:

Enclosed on behalf of Network Access Solutions, Inc. ("NAS") is the original and four copies of a paper that responds to questions posed in a meeting with FCC staff on Friday, October 30. We filed a Notice of that meeting on November 2.

Sincerely,

Rodney L. Joyce

Enclosure

RLJ:bsb

cc: Liz Nightingale (Rm. 534-O)
Jason Oxman (Rm. 534-W)
Brent Olson (Rm. 534-I)
Staci Pies (Rm. 538-B)
Jonathan Askin (Rm. 544)
Evan Kwerel (Rm. 822)
Daniel Shiman (Rm. 534-S)
Stagg Newman (Rm. 268, 2000 M St.)
Doug Sicker (Rm. 290G, 2000 M St.)

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QUESTION 1: Why does NAS believe that the FCC has statutory jurisdiction to require, rather than merely authorize, that a LEC provide DSL service through a separate affiliate?

ANSWER: By its terms, Section 201(b) of the Communications Act gives the FCC jurisdiction to take any action necessary to ensure that interstate telecommunications service is provided on terms that are just and reasonable. Last Friday, the Commission ruled that the DSL services now being provided by LECs constitute interstate telecommunications service.[1] The record in this proceeding shows that it is necessary to require that a LEC provide DSL service through a separate affiliate in order to ensure that its offering is provided on terms that are just and reasonable.[2]

QUESTION 2: What are the minimum rules governing the relationship between a LEC and its separate affiliate that should be adopted to help ensure that the affiliate provides DSL service on just and reasonable terms?

ANSWER: The FCC should adopt several rules that it proposed in its Notice. First -- and most important -- the agency should make it unlawful for a LEC to discriminate in any way in favor of its DSL affiliate in the provision of "any goods, services, facilities or information."[3] Since this is the single most needed rule to govern the relationship between a LEC and its separate affiliate, the FCC should give examples of the types of conduct that this rule bars, and it should include on its list of examples each of the following discriminatory practices since LECs currently engage in these practices:

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1 See GTE Telephone Operating Companies, FCC 98-292, rel. Oct. 30, 1998.

2 See, e.g., NAS Comments at 4-6; NAS's Reply at 1-4; Northpoint Reply at 1-5; Rhythms Comments at 14-20. The Commission already has held that LECs must provide certain other interstate services through a separate affiliate to ensure that they are offered on just and reasonable terms. See, e.g., Regulatory Treatment of LECs' Provision of Interexchange Services, 12 FCC Rcd. 15756 (1997) (ordering all LECs to provide interstate interLATA service through a separate affiliate).

3 Notice at ¶ 96 (emphasis added).

- Collocation intervals: A LEC may not provision collocation arrangements for its separate affiliate more quickly than the LEC provisions such arrangements for other DSL providers.

- Loops provisioned via DLCs: A LEC's separate affiliate may not place DSL line cards in DLCs on terms that are different from those available to other DSL providers.

- Frequency unbundling: A LEC's separate affiliate may not provide DSL service over loops also used by the LEC to provide exchange service unless the LEC gives unaffiliated DSL competitors the right to provide DSL service over loops that also are used by the LEC to provide exchange service.

- Cost allocation: A LEC must allocate the same UNE, collocation and OSS costs to its DSL affiliate that it imposes on other carriers that provide DSL service.

- Interconnection agreement: A LEC's separate affiliate must enter into the same type of interconnection agreement with its affiliated LEC that all other DSL carriers must enter.[4]

- Limitations on deployable DSL equipment: A LEC may not require a given piece of equipment that an unaffiliated DSL provider collocates in a LEC CO to comply with NEBS if the LEC uses the same equipment. Likewise, a LEC may not prohibit deployment of a particular type of DSL equipment in a CO on the ground that it inherently includes switching capability if the LEC's own DSL equipment includes the same capability.

- Availability of DSL loops: A LEC's UNE rates for DSL-compatible loops must be in effect before the LEC's separate affiliate offers retail DSL service.

- Provisioning, maintenance and repair: A LEC may not provide its separate affiliate with UNE provisioning or with maintenance or repair service on different terms than those at which these services are provided to other DSL carriers.

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4 In its Notice, the FCC listed, as separate rules, the proposed no-discrimination rule and the proposed requirement that a LEC's DSL affiliate enter into an interconnection agreement with its affiliated LEC. In fact, the latter is a specific application of the former.

Second, the FCC should require that a LEC's separate affiliate keep its own books, records, and accounts.[5] Requiring that the affiliate keep separate accounting records is necessary to enforce the requirement set forth above that the LEC allocate to the affiliate the same UNE, collocation, and OSS costs that it charges other DSL providers.

Third, the Commission should require that a LEC's separate affiliate have its own officers, directors, and employees.[6] This will aid the agency in preventing the LEC from engaging in a price squeeze by setting the price of DSL service at a level designed to produce revenues below allocated costs. Rules barring discrimination and requiring separate accounting records do nothing to help prevent a LEC from engaging in a price squeeze as NAS has explained.[7]

Fourth, the Commission should require that each transaction between a LEC and its separate affiliate (i) be entered on an arm's length basis, (ii) be reduced to a writing that describes the terms of the transaction and contains a detailed description of any asset or service transferred in the transaction, and (iii) comply with the agency's existing affiliate transaction rules.[8] These requirements also will help reduce the risk that LECs will impose a price squeeze on their DSL competitors.

Finally, the FCC should adopt a rule requiring that a LEC affiliate use physical collocation (rather than virtual collocation) in order to reduce the risk that physical collocation pricing will be used to impose a price squeeze on the separate affiliate's DSL competitors since DSL carriers other than a LEC's separate affiliate have no incentive to use virtual collocation given that virtual collocation requires equipment operation and maintenance functions to be turned over to the LEC. It is critical that LECs provide physical collocation arrangements on reasonable terms since the cost of physical collocation constitutes a far bigger share of the cost to provide DSL service than to provide exchange service as NAS has explained.[9] Unless a LEC's separate affiliate is required to use physical collocation, the LEC will have no incentive to provide physical collocation arrangements on reasonable terms.

While NAS would support adoption of the three remaining rules that the FCC has proposed, it also would support the Commission's separate affiliate structure even if these three remaining rules were not adopted. The first of these three proposals -- to bar the LEC and its separate affiliate from jointly owning a switch used to provide DSL service or the land and building

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5 Notice at ¶ 96.

6 Id.

7 NAS Reply at 3.

8 Notice at ¶ 96.

9 NAS Comments at 10 n.10.

where that switch is located -- is not essential since most DSL offerings presently contemplated do not require use of a switch.[10] The second -- to prohibit a LEC's separate affiliate from relying on the LEC's credit rating in financing the separate affiliate -- also is not necessary.[11] While a LEC's separate affiliate certainly will benefit if it relies on the credit rating of its affiliated LEC, it is not essential that the FCC prevent the affiliate from obtaining this benefit since it does not result from unfair discrimination or predatory conduct. The FCC's final proposal -- to prohibit a LEC from performing operating, installation or maintenance functions for its separate affiliate [12] -- also is not essential as long as the agency requires that the affiliate use physical collocation arrangements (rather than virtual collocation arrangements). Prohibiting the affiliate from using virtual collocation arrangements makes it unnecessary to prohibit the affiliate from obtaining all operating, installation or maintenance functions from its affiliated LEC since much of the unfair discrimination and cross-subsidization that would be stopped by a rule barring the separate affiliate from obtaining any operation, installation, or maintenance service from the LEC also will be stopped by a rule barring use of virtual collocation.

QUESTION 3: Should a LEC be permitted to transfer facilities to its separate affiliate?

ANSWER: NAS would not oppose a rule that authorizes a LEC to transfer ownership to the separate affiliate of any DLSAMs that the LEC acquired prior to adoption of the requirement that the LEC provide DSL service through a separate affiliate. Any such transfer would be subject to the FCC's proposed rule described above that all transactions between a LEC and separate affiliate be reduced to writing and comply with the FCC's affiliate transaction requirements. The Commission should not permit the LEC to transfer any other assets to the separate affiliate.

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10 Notice at ¶ 96.

11 Id.

12 Id.